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In the Supreme Court of the United States

OCTOBER TERM 1938.

No.

HYMAN SCHER, alias WILLIAM SCHER,

Petitioner-Appellant,

vs.

THE UNITED STATES OF AMERICA,

Respondent-Appellee.

BRIEF OF PETITIONER-APPELLANT.

I.

GENERAL STATEMENT.

(All emphasis in this brief is ours unless otherwise designated.)

Hyman Scher was indicted in the United States District Court for the Northern District of Ohio on May 31, 1936, for alleged violation of Section 1152A, title 26, U. S. C. A. which creates and defines offenses against the Internal Revenue Laws of the United States.

Indictment contained two counts, one for the unlawful possession of a quantity of distilled spirits, the immediate containers not having affixed thereto stamps denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue tax.

The second count alleged that the petitioner-appellant did unlawfully transport, in a Dodge de-luxe sedan automobile, a quantity of distilled spirits the immediate containers of which did not have affixed thereto stamps denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue tax imposed thereon.

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The petitioner-appellant filed a motion to suppress the evidence obtained by the search made by the Internal Revenue agents on the ground that such search was not based upon probable or reasonable cause and was in violation of the petitioner-appellant's rights under the State and Federal Constitution. This motion was overruled by the District Court on May 5, 1937 and an opinion is filed by Honorable Samuel H. West, Judge of the District Court of the United States, trial Judge. (Record 7.)

The case then proceeded to trial and the petitioner-appellant was found guilty under both counts. The verdict was returned on May 7, 1937. (Record 10 and 11.)

Petitioner-appellant's motion for a new trial was overruled (Record 12 and 13) and the Court sentenced the petitioner-appellant to imprisonment for a period of one year and one day, and the Court further imposed a fine of Three Hundred Dollars (\$300.00) and costs.

A notice of appeal was then filed by the petitioner-appellant (Record 13) and the principal errors relied upon by the petitioner-appellant in the Circuit Court of Appeals for the Sixth Circuit was the action of the trial Court in overruling the motion to suppress the evidence, and its ruling on objections to questions relating to confidential informants. The Court of Appeals, on February 18, 1938, affirmed the judgment of the trial Court.

Subsequently a petition for rehearing was filed in the United States Circuit Court of Appeals for the Sixth Circuit and on April 13, 1938 the petition for rehearing was denied. Petition for writ of certiorari was filed in this Court on May 18, 1938 and the order allowing certiorari filed May 31, 1938. (Record 78.)

II.

STATEMENT OF FACTS.**A. Facts as to Motion to Suppress Evidence.**

The petitioner-appellant, Hyman Scher, resides with his parents at 10025 Olivet Avenue, Cleveland, Ohio, in a two family house with a double garage in the rear of the premises, located about six feet to the rear of the house and within the curtilage of the home, and had so resided for the past fourteen years. (Record 19.) The home was situated in a strictly residential district and no business was carried on in the premises or in the vicinity.

The defendant was never charged with trafficking in liquor and had never been arrested or convicted on any criminal charge whatsoever, nor did the revenue officers ever have any complaints against the petitioner-appellant.

On December 31, 1935, the Revenue Officers received information from a source which the Revenue Officers said had heretofore found to be reliable to the effect that "phony" whiskey was being sold from certain premises at 10838 Drexel Avenue, Cleveland, Ohio, and that at midnight or shortly thereafter a load of this whiskey would be taken from those premises in a Dodge car, license LX 418.

The Revenue Agents observed those premises from 8 o'clock P. M. on that day. At about midnight a Dodge automobile drove up toward the garage of the premises at 10838 Drexel Avenue. The lights of the car were out and the car remained in said driveway for about one-half hour. One of the officers heard something heavy set down like wood, and heard it slide, like it was heavy paper, across a wooden surface, heard the door slam, the trunk slam and the door of the car slam. The car then was driven out of the driveway and the Revenue Agents followed it to a gasoline station several blocks away where the car stopped. The man later identified as the petitioner-appellant alighted, the gasoline station attendant put gasoline

in the tank and the petitioner-appellant walked across the street and returned with a newspaper in his hand.

The car then was driven about two or three blocks to Olivet Avenue where the petitioner-appellant drove his car slowly to a stop and then turned into the driveway of his home located at 10025 Olivet Avenue, Cleveland, Ohio.

The petitioner-appellant drove said automobile into his garage, turned off the lights and was in the act of getting out of the car when one of the investigators, with a flash light in his hand, approached the petitioner-appellant and asked the petitioner-appellant if he was hauling bootleg liquor. In response to a question by the investigator if he was hauling bootleg whiskey, petitioner-appellant replied, "Just a little for a party."

In a reply to a question of the officers as to whether it was tax paid, the petitioner-appellant replied, "It is Canadian whiskey," and in response to the investigator's question said it was in the trunk of the car. The Revenue Agents then forced open the trunk and found therein eighty-eight bottles without tax stamps on the bottles or cases. The petitioner-appellant was then arrested and the automobile and bottles confiscated. (Record 24-27.) The search was admitted to have been made without a search warrant.

B. Facts as to Confidential Informer.

Upon the trial of this cause in the District Court, certain questions relating to the identity of the informer and the source of the information obtained by the Revenue Agents and which the Revenue Agents considered reliable were objected to by counsel for the Government and the objections sustained by the Trial Court to which the petitioner-appellant excepted. Counsel for petitioner-appellant inquired of the Revenue Agents whether or not the Revenue Agents had received confidential information concerning the petitioner-appellant which he had considered reliable.

and which later turned out to be unreliable, false and perjurious. (Record 29.) Further the Court sustained objections over the exception of the petitioner-appellant as to a question as to the identity of the confidential informer.

Counsel for petitioner-appellant made a proffer to show by this line of cross examination that the Revenue Agent had received information which he considered reliable at a former trial of the petitioner-appellant, which testimony, after an investigation by the Attorney General of the United States proved to be false, perjurious and unreliable: (Record 34 and 35.)

The Court overruled an objection the Answer of the Revenue Agent that he had received reliable information from a confidential informer as to a certain Dodge automobile, to which petitioner duly excepted. (Record 28.)

The Court refused to permit counsel for petitioner-appellant at any time to cross examine or inquire from the Revenue Agent as to the identity of the alleged confidential informer and the source of the confidential information and the reliability thereof.

III.

ASSIGNMENT OF ERROR IN THE COURT OF APPEALS.

Exceptions were duly taken to the trial Court's action in overruling the motion to suppress the evidence, in overruling petitioner-appellant's motion for a new trial, and also as to the rulings of the Court upon the questions relating to the confidential informer relied upon by the Revenue Agents to justify their search of the petitioner-appellant's home.

The substance of the errors principally relied upon in the Court of Appeals, briefly stated, is as follows:

1. The Court erred in overruling petitioner's motion to suppress evidence on the ground that the search was unlawful and not based upon probable cause, and was in vio-

lation of the petitioner-appellant's right under the State and Federal Constitutions.

2. The Court erred in refusing to permit petitioner-appellant to examine witnesses as to the identity and reliability of the confidential informer and as to the reliability of the information furnished the Revenue Agents.

3. That the Court erred in overruling the petitioner-appellant's motion for a new trial based upon the assignments of error hereinabove set forth.

IV.

ACTION OF THE COURT OF APPEALS AND HOLDINGS BELIEVED TO BE ERRONEOUS.

The Court of Appeals affirmed the judgment of the Court below and after making a statement of facts, as appears in the opinion, and which is attached hereto and marked Appendix A, stated the following conclusions of law:

1. The Court found that there was no unlawful search and seizure and that the circumstances presented facts within the personal knowledge of the agents sufficient to lead a reasonably discreet and prudent man to believe that liquor was unlawfully possessed in the automobile.

It is respectfully submitted that the record contains no evidence to show that there was probable cause to believe that *tax unpaid* liquor was possessed or being transported by the petitioner and that there was therefore, no probable cause for the search without a warrant, and therefore that the search and the seizure was in violation of Section 14, Article 1 of the Constitution of Ohio and the 4th and 5th Amendments to the Constitution of the United States.

2. The Court further held that "the garage was not searched."

It is respectfully submitted that the record clearly shows that the garage of the petitioner-appellant was located within the curtilage of the petitioner's home and residence; that the automobile at the time of the search was at rest and in said garage.

It is respectfully submitted that the Court erred in holding that the garage was not searched.

3. The Court found that for reasons of public policy the identity of a confidential informer must be kept secret and such source need not be disclosed.

It is respectfully submitted that this ruling of the Court is erroneous in that the defendant was thus precluded from cross examining the witness so that the Court, and not the Revenue Agents themselves, might determine whether or not the information received by the Revenue Agents was reliable information, or whether it was pure speculation and hearsay.

V.

OPINION OF THE COURT.

1. The opinion in the United States Circuit Court of Appeals for the Sixth Circuit was handed down on February 18, 1938 and is reported in 95 Fed. (2) 64. A copy of this opinion is attached hereto and marked "Appendix A."

2. Subsequently a petition for rehearing was filed by the petitioner-appellant which was denied on April 13, 1938. On that same date, to-wit: April 13, 1938, the Court of Appeals made an order amending its opinion by striking out next to the last paragraph thereof, the following sentence, "Appellant did not oppose the search of the car." A copy of said order is attached hereto and marked "Appendix B."

VI.

SPECIFICATIONS OF ERRORS.

The judgment of the Court of Appeals and the Trial Court should be reversed and the cause remanded for a rehearing upon the following grounds:

1. The Trial Court should have sustained the petitioner-appellant's motion to suppress the evidence, and the Court of Appeals erred in failing to reverse and remand the cause because of its failure to do so, for the following reasons:

(a) That there was no reasonable or probable cause such as would lead a reasonably discreet and prudent man to believe that tax unpaid liquor was possessed and being transported by the petitioner-appellant.

(b) That there was an unlawful search of the petitioner-appellant's premises and an unlawful seizure in violation of the petitioner-appellant's rights under the United States and Ohio Constitutions.

(c) That the garage in which the automobile was located and where the search was made, was within the curtilage of the petitioner-appellant's home and therefore within the protection of the Constitutional guarantees against unreasonable search and seizure.

2. In that the Trial Court should have permitted petitioner-appellant to cross-examine and examine witnesses as to the identity of the confidential informer and the source of the information so that the Court might determine whether or not the witness had reasonable cause to believe this informant and whether the information was reliable; secondly, petitioner-appellant was entitled to know the identity of the informer so that he might, if possible, impeach the testimony of the Government witnesses.

The Court of Appeals erred in failing to reverse and remand the cause because of error of the Trial Court in refusing to permit said examination as aforesaid.

3. The Trial Court erred in overruling petitioner-appellant's motion for a new trial, and the Court of Appeals erred in failing to reverse and remand the cause because of its failure to do so for the reasons first above stated.

VII.

ARGUMENT.

(In this brief and argument, petitioner-appellant will be designated as defendant.)

A. MOTION TO SUPPRESS EVIDENCE.

1. The Search of the Premises Was in Violation of Defendant's Rights.

Under and by virtue of the terms of the Fourth Amendment of the Constitution of the United States, the defendant had a right to ~~have~~ his private dwelling and, therefore, his garage, exempt from unreasonable search and seizure.

In the case of *Gray vs. United States*, decided November 7th, 1932, 53 S. Ct. Rep., page 38, the affidavit for the search warrant states that the affiant went around and about the premises therein described and saw persons hauling cans, commonly used in hauling whiskey, and what appeared to be corn sugar up to and into the place and saw the same car or truck haul similar cans apparently heavily loaded away from there and smelled odors and fumes of cooking mash coming from the place and he said there was a still and whiskey mash on the premises. We quote from the opinion on page 40 as follows:

"The affidavit fails to state the place to be searched is not a private dwelling, and the record affirmatively shows it was. At most the deposition charges the manufacture of whiskey; no averment of sale is made; indeed no facts are given from which sale, on or off the

premises described, necessarily is to be inferred. The Court below, however, held that the facts set forth warranted a belief that the dwelling was being used as headquarters for the merchandising of liquor. This was deemed a sufficient compliance with the statutory permission for search of a dwelling if 'used for the unlawful sale of intoxicating liquor.'

"(2, 3) The broad construction of the act by the Court of Appeals unduly narrows the guaranties of the Fourth Amendment, in consonance with which the statute was passed. Those guaranties are to be liberally construed to prevent impairment of the protection extended. *Boyd vs. United States*, 116 U. S. 616, 635, 6 S. Ct. 524, 29 L. Ed. 746; *Gould vs. United States*, 255 U. S. 298, 304, 41 S. Ct. 261, 65 L. Ed. 647; *Go-Bart Co. vs. United States*, 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed. 374. Congress intended, in adopting section 25 of title 2 of the National Prohibition Act, to preserve, not to encroach upon, the citizen's right to be immune from unreasonable searches and seizures, and we should so construe the legislation as to effect that purpose.

"(4, 6) A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury (*Giles vs. United States* (C. C. A.) 284 F. 208; *Wagner vs. United States* (C. C. A.) 8 F. (2nd) 581), and would lead a man of prudence and caution to believe that the offense has been committed (*Steele vs. United States*, 267 U. S. 498, 504, 45 S. Ct. 414, 69 L. Ed. 757). Tested by these standards, the affidavit was insufficient. While a dwelling used as a manufactory or headquarters for merchandising may well be and doubtless often is the place of sale, its use for those purposes is not alone probable cause for believing that actual sales are there made.

"The process should have been quashed, and the articles seized delivered to the petitioner. Their admission as evidence was error, and the judgment must be reversed.

"Reversed."

"Mr. Justice Stone and Mr. Justice Cardozo are of the opinion that the judgment should be affirmed."

We quote from *Angello vs. U. S.*, 269 U. S. 20; 51 A. L. R. 413:

"While the question has never been directly decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein. *Boyd vs. United States*, 116 U. S. 616, 624 *et seq.* 630, 29 L. Ed. 746, 748, 751, 6 Sup. Ct. Rep. 524; *Weeks vs. United States*, *supra*, 393 (58 L. Ed. 655, L. R. A. 1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1177); *Silverthorne Lumber Co. vs. United States*, *supra*, 391 (64 L. Ed. 321, 24 A. L. R. 1426, 40 Sup. Ct. Rep. 182); *Gouled vs. United States*, 255 U. S. 298, 308, 65 L. Ed. 647, 652, 41 Sup. Ct. Rep. 261. The protection of the 4th Amendment extends to all equally;—to those justly suspected or accused as well as to the innocent. The search of a private dwelling without a warrant is, in itself, unreasonable and abhorrent to our laws. Congress has never passed an act purporting to authorize the search of a house without a warrant. On the other hand, special limitations have been set about the obtaining of search warrants for that purpose."

Not only is the search illegal because the Federal officers made their way into part of a private dwelling without a warrant, but also because they were trespassers within the curtilage of the defendant's home when they discovered evidence of the crime.

The constitutional prohibition against unreasonable searches and seizures is construed liberally to safeguard the rights of privacy. *U. S. vs. Lefkowitz*, 285 U. S. 452, 52 S. Ct. 420; *Go-Bart Importing Co. vs. U. S.*, 282 U. S., 344, 51 S. Ct. 153; *Taylor vs. U. S.*, 286 U. S. 1, 52 S. Ct. 466; *Sgro vs. U. S.*, 53 S. Ct. 138.

In the case of *U. S. vs. Slusser*, 270 Fed., 818, the officers entered upon the private premises and searched an automobile which was in the garage. That search was held illegal.

In the case of *United States vs. DiCorvo*, 37 F. (2d) 124, the court held that an officer had no right to enter the private driveway of a farm house for the purpose of discovering intoxicating liquor.

In the case of *Elrod vs. Moss*, 278 Fed. 124, the court held that an officer must have personal and direct knowledge through his hearing, sight or other senses of the commission of the crime of which the defendant is accused.

It is clearly the law that a search of private premises, unreasonable and not based on probable cause at the time it was made, is not made lawful by what is found after the search is made, and that a seizure on mere suspicion is not justified by the confirmation of that suspicion. See *Gauske vs. United States*, 1 F. (2d) 620; *U. S. vs. Olmstead*, 7 F. (2d) 760; *U. S. vs. Spallino*, 21 F. (2d) 567.

In the case of *Wakkuri vs. U. S.*, 67 F. (2d) 844, decided by the Circuit Court of Appeals for the 6th Circuit on December 11, 1933, the officers had observed smoke coming out of a chimney in a bath house, located about 80 feet from the defendant's main dwelling house. The officers, also, had received complaints that the liquor law was being violated. On the morning before the search was made, two of the officers had concealed themselves near the bath house and could smell odors of cooking mash. They saw puffs of steam coming out of a vent in the building and saw spent grain near by. The officers had no warrant of any kind. The officers then entered upon the premises of the defendant, knocked upon the door of the bath house and when the door was opened by the defendant, saw the defendant standing beside a still about 3 feet from the door, saw whiskey running into a 12 gallon container, and saw

barrels, kegs and jugs in the bath house. The officers then placed the defendant under arrest, entered the building, and seized some of the whiskey and paraphernalia for evidence. The court held that the search of the bath house was illegal and a violation of the defendant's constitutional rights. The syllabus of said case reads as follows:

"1. Bath house adjacent to dwelling house on small farm held within curtilage of home and within protection of the Constitution against unreasonable searches and seizures.

3. Any search of private dwelling without a search warrant is at least prima-facie unlawful.

4. That which might not be done with invalid search warrant, the only kind which could have been obtained, could not be permitted without any warrant.

5. Search of premises without warrant held not justified on grounds defendant was found in dwelling in commission of crime, where at that time officers had no knowledge of facts which had justified arrest and supported conviction."

The court held that the evidence as submitted by the officers would have been insufficient to obtain a search warrant; and, therefore, the search was unlawful and the motion to suppress should have been granted. The court, on page 845, of the *Wakkuri* case, says:

"Just as the validity of a search may not be judged by what it brings to light, so the right to search must be decided by the situation as disclosed before the search is made."

In the following cases where automobiles were searched on the road, the court held the search illegal by reason of the fact that the officers did not have probable cause to search the automobile without a warrant.

In the case of *U. S. vs. Allen*, 61 Fed. (2nd), 320, the agents had information that an automobile was going to

haul liquor. One of the automobiles was to be a Studebaker with blue headlights, a driving light in the center and in which the rear glass of the right hand door had been broken and mended with tape. The agents watched the road, and saw such a Studebaker driving down the road. The automobile appeared to be heavily loaded and there was mud on the back of the car. The court held that the motion to suppress, based on search without warrant, should be sustained on the ground that there were no facts such as to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported.

In the case of *Emite vs. U. S.*, 15 Fed. (2nd) 623, the officers were informed that cars parked at a certain ice plant hauled bootleg liquor from that plant. The officers had seen the defendant's car parked by the side of the ice plant and had seen it leave the plant. The car appeared to be heavily loaded and weighed down on the springs, and the officers in following the car noticed that the car went over bumps very carefully. The officers stopped the car on the road without a warrant and found liquor in the car. The court held that under these facts, there was no probable cause that the defendant was unlawfully in possession of and transporting liquor, and the evidence should have been excluded.

In the case of *Brown vs. U. S.*, 4 Fed. (2nd) 247, the officer saw the plaintiff park his car at the curb, remove some baggage from the back part of the car and start up the street. The package that the plaintiff carried was not smooth and from its appearance might contain bootleg whiskey. The officer arrested the plaintiff. Prior to that the officer had been informed that the plaintiff was a bootlegger and the license of the car was furnished, but the source of the information was not disclosed. The officer testified that he had seen the plaintiff deliver two packages before that time but testified that he did not know for cer-

tain what the packages contained. The court held that the officer was acting merely on suspicion and held the search illegal.

In the case of *U. S. vs. Alspach*, 12 Fed. Supp., 293, two agents had information that the defendant was delivering tax unpaid liquor. The agents saw the defendant come out of the house, place a black oil cloth bag in the back end of his coupe and close the lid. The agents testified that from the appearance of the bag it contained a bottle or a jug, and that they could see glass through a worn part of the bag. The defendant drove his automobile into an alley. The agents followed, searched the back end of the car and found liquor. They had no warrant. The court held that the search was illegal. The syllabus reads as follows:

"1. Information that defendant was delivering tax unpaid liquor and sight of defendant coming out of house and placing in automobile black bag through worn part of which officers could see glass, *held not to show probable cause that tax unpaid liquor was being transported or concealed nor to justify arrest of defendant without warrant and seizure of automobile and liquor found therein.*

2. To make arrests, searches and seizures without warrant, there must be probable cause of transportation or possession of liquor on which tax is unpaid."

The court in its opinion, on page 294, says:

"It must be remembered that, to make arrests, search and seizures without warrants since the repeal of the 18th Amendment, there must be probable cause not only of the transportation or possession of liquor, *but of liquor on which the tax is paid*, since it is not unlawful to transport or possess tax paid liquor. The cases decided during the prohibition era, and which are cited by the government, must therefore be viewed in this light."

In the case of *United States vs. Kind*, 87 Fed. (2nd) 315, the indictment charged the defendant with unlawfully possessing liquor without tax stamps, under Section 1152A, United States Code. The facts adduced showed that on April 18, 1936, agents of the Government went to a garage which was rented by the defendant Kind, looked through the window and saw a number of five-gallon cans wrapped in paper and three-gallon cans "usually used in transporting Belgian alcohol." The doors were locked and therefore an agent remained at the premises until the next morning when the appellant drove up in an automobile and opened the garage. The agent then testified that he detected the odor of liquor. The agents thereupon *entered the garage*, announced that they were Federal officers, arrested the defendant, *searched his car* and found in the car two bottles of liquor not containing stamps. The cans and the bottles were both seized.

The agents also testified that an investigator in the district had advised them that the particular automobile searched had been used in transporting alcohol, both Belgian and domestic, and that the defendant had been seen making deliveries of alcohol to various stores. The agents at no time had a search warrant. The lower court overruled a motion to suppress the evidence, and this judgment was reversed by the Circuit Court of Appeals, which held that the motion to suppress should have been granted.

The syllabus of that case reads as follows:

"1. *Searches and seizures*

Search of garage and seizure of alcohol in unstamped containers without warrant *after seeing accused drive automobile into garage* held unlawful where federal agents acted upon mere tip from unknown source, and because of smell of alcohol on outside of garage, and had opportunity to obtain warrant. (Liquor Taxing Act of 1934, 201, 26 U. S. C. A. 1152A; Const. Amend. 4.)

"2. Criminal law

Alcohol in unstamped containers seized in garage leased by accused, in an unlawful search and seizure, held improperly received in evidence, in prosecution for possessing alcohol in unstamped containers. (Liquor Taxing Act of 1934, 201, 26 U. S. C. A. 1152A; Const. Amend. 4.)

"3. Searches and seizures

Search of garage and seizure of alcohol in unstamped containers found therein without warrant after receiving tip from unknown source, and noticing alcohol odor on outside of garage, and seeing accused drive automobile into garage could not be justified as incident of lawful arrest, since there was no probable cause to believe that crime of possessing alcohol in unstamped containers was being committed in presence of officers. (Liquor Taxing Act of 1934, 201, 26 U. S. C. A. 1152A; Const. Amend. 4.)"

The Court in its opinion says:

"Nor can the search be justified as an incident of a lawful arrest. See *Angello v. U. S.*, *supra*; *U. S. v. Lee*, *supra*. The entry of the garage having been made without a search warrant and without probable cause, 'the search and seizure were undertaken with the hope of securing evidence upon which to indict and convict' the appellant. *Taylor v. U. S.* *supra*, 286 U. S. 1, at page 5, 52 S. Ct. 466, 467, 76 L. Ed. 951. The smell of alcohol alone did not strip the tenant of the garage of his constitutional guarantee against unreasonable search. In the absence of probable cause to believe that the crime—that of possessing alcohol in unstamped containers—was being committed in the presence of the officers, there was no basis for a lawful arrest, and consequently no right of search and seizure.

"Judgment reversed."

In the case at bar, the officers had far less justification for the search and seizure made. The agents in the case

at bar did not know that the defendant had liquor in his possession *without tax stamps*, did not see defendant make deliveries, nor did they smell alcohol. The entire search was based on the alleged tip. The agents acting on this alleged tip, thereupon proceeded with the search and seizure of the garage at the defendant's home,—this in direct violation of the defendant's constitutional rights.

During the prohibition era, the courts uniformly held, as may be seen from the cases cited herein, that a search warrant could not be issued nor a search without warrant be made of a private dwelling unless based on such facts that would lead a man of reasonable prudence and caution to believe an offense had been committed. That was the rule during the period when the mere possession of any kind of intoxicating liquor was unlawful.

Now, under the Internal Revenue Laws, the possession of liquor in itself is not unlawful—it is unlawful to possess or transport "*tax unpaid liquor*," and then only, provided that the liquor is intended for sale or for the use in the manufacture of articles intended for sale.

It is, therefore, our contention that to constitute probable cause warranting the search of a private dwelling without a warrant, the facts upon which the search is based must be such as to impart to the agent a reasonable belief, such as a reasonably prudent and cautious man would believe, that *tax unpaid liquor* was in the possession of and was being transported by the accused and that said *tax unpaid liquor* was intended for sale or for the manufacture of articles intended for sale. *The mere possession of liquor is no longer an offense.*

In the case at bar, the facts upon which the search without warrant of the defendant's garage, a private dwelling, was based, are testified to by the Government agent, Sidney M. Bowes (Record, 24), in the hearing on the motion to suppress the evidence. The information upon which

the Government agents relied was that a certain Dodge automobile would transport "phoney whiskey" from a certain address at a certain time. There was no information which would lead a reasonably cautious and prudent man to believe that the so-called "phoney whiskey" was tax-unpaid liquor, nor that it was intended for sale or for the use in the manufacture of articles intended for sale.

It is highly conceivable and highly probable that "phoney whiskey" might still have tax stamps thereon. To say that the use of the phrase "phoney whiskey" would impart such information to an agent and give him probable cause so as to authorize him to violate the sanctity of a man's private dwelling without even a search warrant would be to go farther and to stretch beyond recognition the principles laid down by our Constitution to protect the privacy of a man's home.

In the case of *U. S. vs. Blich*, 45 Fed. (2nd) 627, the court held that where agents had been informed by a reliable person, whom they believed, that transportation was to take place at a certain date and place and where the defendant had previously been convicted for violating liquor ordinances, that this was insufficient to constitute probable cause for the search of an automobile without a warrant. Syllabus 3 of that case reads as follows:

"3. Probable cause for search of an automobile for liquor transportation without warrant should be such as might be established in competent tribunal as basis for warrant."

In the case at bar, the search is not merely that of an automobile, *but is a search of a garage in which the automobile was located.*

It is conceded that the automobile was in the garage, and the defendant was walking away from the automobile at the time of the search. This is not a case where an automobile is stopped and searched on the highway. It

is a case where private premises were invaded, and in the process of this invasion, an automobile is searched, in the garage, and within the curtilage of the private premises. This case is comparable to one where a package is located in a garage, the garage is invaded and the package broken open and searched. The automobile, like the package, was within the garage and the garage was invaded by the officers without probable cause and without any search warrant whatsoever.

At the time the officers entered upon the premises of the defendant they had absolutely no cause to believe that the defendant was transporting *tax unpaid liquor* intended for resale. Their justification for this trespass is based on facts which are not sufficient to lead a reasonably discreet and prudent man to believe that *tax unpaid liquor* which was intended for resale was illegally in defendant's automobile.

The officers claim probable cause based on information obtained from an informant, whom they refused to disclose, but whom they believed to be reliable. They saw the defendant early in the evening leave the house at 10838 Drexel Avenue with three women. Subsequently the defendant returned to the home around midnight. They heard a rustling of heavy paper against a hard surface. Then they saw the defendant leave the premises at 10838 Drexel Avenue and proceed to East 105th Street. *The driver of the car was not in any hurry nor did he appear to be running away.* In fact, the agent, Sidney M. Bowes, testified that his movements after he left 10838 Drexel Avenue were not suspicious.

The court held these facts sufficient to constitute probable cause permitting the agents to invade the sanctity of the defendant's home, to go into his garage, to forcibly break open the trunk compartment of the defendant's automobile and search this automobile.

It will certainly be conceded that the agent could, by no stretch of the imagination, have obtained a search warrant, and, therefore, could not make such search without warrant.

If the facts within the knowledge of the Government agents could not justify the issuance of a search warrant, those same facts could not justify the search of the automobile in the garage of the defendant's home.

Furthermore, the officers could have obtained a warrant to search the defendant's automobile if they believed they had reasonable and probable cause so to do, after the automobile had been placed in the defendant's garage. It would be a simple matter to have one of the agents obtain the search warrant while the other watch the premises to see that the automobile did not leave.

In the case of *United States vs. Kaplan*, 89 Fed. (2nd) 869, the Court on page 871 of its opinion says:

"We are told that unless such evidence will serve, it will be impossible to suppress an evil of large proportion in the residential part of Brooklyn. Perhaps so; any community must choose between the impairment of its power to punish crime and such evils as arise from its uncontrolled prosecution. But the danger is not certain, for the officers could have applied for a warrant which—as was at least intimated in *Taylor vs. United States*—might then have been valid. It takes time to break up a still and take the parts away; if the attempt was made, it would discover itself immediately. One or more officers could have watched, while the others went to a judge or a commissioner, whose action would at least have put a different face upon their subsequent proceedings."

According to the testimony of the agents, they knew many hours prior to the arrest and seizure that that certain Dodge car would transport the "phoney whiskey."

Surely in all those hours, one agent could have gone to the judge or commissioner and obtained a search warrant if they thought the evidence sufficient.

We therefore contend that the invasion of the defendant's garage was a direct violation of the defendant's rights as guaranteed to him by the Constitution of the United States and by the Constitution of Ohio.

2. The Garage that was Searched was that of a Private Dwelling.

It is contended that the search of the garage in which the defendant's automobile was parked at the time of the search and seizure of the evidence herein, is part of the private dwelling occupied by the defendant since it is within the curtilage, and that, therefore, the search made in this matter was a search of a private dwelling.

The Fourth Amendment of the Constitution of the United States reads as follows:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the places to be searched, and the persons or things to be seized."

The provisions of this article of the Constitution and the Ohio Constitution, Article 1, Section 14, are substantially a recitation of what was a part of the common law and is intended to protect every citizen against unreasonable encroachment upon the sanctity and privacy of his private dwelling.

In the case of *United States vs. Slusser*, 270 Fed., 818, it was held that a garage close to the dwelling was a part of the home.

In the case of *Temperani vs. United States*, 299 Fed., 365, the court went into the question as to whether or not the term "private dwelling" as used in the National Prohibition Act is synonymous with the words "dwelling house" as handed down to us in earlier decisions. In that case a garage underneath a dwelling house had been searched. A motion was made to suppress the evidence because of an unlawful search. The court said (quoting from *Bare vs. Com.*, 122 Va. 783; 94 S. E. 168):

"We know of no analogy in the law for the construction of this language except such as is found in the common and statute law referring to arson, burglary, and the homicide and assault cases, where the prisoner claims to have committed the alleged crime in self-defense after having retreated to his castle or his home. As construed by the courts from the earliest to the latest times the words 'dwelling' or 'dwelling house' have been construed to include not only the main house, but all of the cluster of buildings convenient for the occupants of the premises generally described as 'within the curtilage.'

This rule is supported by Hale, Blackstone, Greenleaf, Bishop, and all the text writers. Within this definition the garage comes clearly within the protection of the Constitution."

See also *People vs. Taylor*, 2 Mich. 250; *Forni vs. United States*, 3 Fed. (2nd) 354; *Guaresimo vs. U. S.*, 13 Fed. (2nd) 848; 12 A. L. R., 1179; *U. S. vs. Palma*, 295 Fed., 149.

In the case of *Taylor vs. U. S.*, 286 U. S. 1, 76 L. Ed. 951, the agents searched a garage without a warrant, found and seized liquor. Their suspicion was based on information that the defendant was violating the Prohibition Law. This suspicion was confirmed by the agents through their senses, in that they smelled the odor of liquor, and was confirmed by peeping through a chink in the garage which

stood adjacent to the defendant's dwelling house. The court held that under those facts the officers were not justified in breaking into the garage and seizing the liquor in order to obtain evidence to establish the guilt of the defendant. The syllabus reads as follows:

"2. Suspicion that a person engaged in violations of the prohibition law, confirmed by the odor of whiskey and by peeping through a chink in a garage standing adjacent to his dwelling, and part of the same premises, will not justify prohibition officers in breaking into the garage and seizing the whiskey for the purpose of obtaining evidence of guilt."

Justice McReynolds delivered the opinion of the court. Quoting from the opinion on page five:

"During the night of November 19, 1930, a squad of prohibition agents, while returning to Baltimore City, discussed premises No. 100 Curtiss Avenue, of which there had been complaints 'over a period of about a year.' Having decided to investigate they went at once to the garage at that address, arriving there about 2:30 A. M. The garage—a small metal building—is on the corner of a city lot and adjacent to the dwelling in which petitioner Taylor resided. The two houses are parts of the same premises.

As the agents approached the garage they got the odor of whiskey coming from within. Aided by a searchlight they looked through a small opening and saw many cardboard cases which they thought probably contained jars of liquor. Thereupon they broke the fastening upon a door, entered and found one hundred twenty-two cases of whiskey. No one was within the place and there was no reason to think otherwise. While the search progressed, Taylor came from his house and was put under arrest. The search and seizure were undertaken upon the hope of obtaining evidence upon which to indict and convict him. We think the action of the agents was inexcusable and the seizure unreasonable. The evidence was obtained unlawfully and should have been suppressed. Prohibi-

tion officers may rely on a distinctive odor as a physical fact indicative of possible crime, but its presence alone does not strip the owner of the building of his constitutional guarantee against unreasonable search."

In the case of *Wakkuri vs. U. S. of America*, 67 Fed. (2nd), 844, decided by the Circuit Court of Appeals for the 6th Circuit on December 11, 1933, the court held that a bathhouse adjacent to a dwelling house on a small farm was within the curtilage of the home and within the protection of the Constitution against unreasonable searches and seizures.

In the case of *U. S. vs. Raho*, 10 Fed. Supp. 660, the syllabus reads as follows:

"Officers seeing smoke from chimney of shanty near restaurant, and smelling odor of mash or alcohol but not seeing commission of crime until they entered premises and opened door of shanty held not justified in searching property without warrant."

The Court in its opinion states the garage was not searched. We respectfully submit that such a statement is fallacious in view of the facts in this case.

The evidence was that the search of the automobile was made after the defendant had driven his car into the garage located on the premises of the defendant's residence.

While the automobile was the object that was searched, the search without a doubt was made in the garage of the defendant, and therefore was a search of the garage itself.

If instead of the automobile in a garage, the search had been made of the drawers of a dresser located in the home of the defendant, clearly it could not be said that the search was not made of the defendant's home.

The Court's position that the garage was not searched is clearly erroneous.

We, therefore, contend that the garage, which was searched by the officers without a search warrant, was part of the curtilage of the defendant's private dwelling, and, therefore, the search made was that of a private dwelling.

B. CONFIDENTIAL INFORMER.

♦ The Court of Appeals held that by reasons of public policy the identity of the confidential informer need not be disclosed.

The Trial Court sustained objections and the following questions were presented by the defendant relating to the confidential informer.

(a) "Q. Did you receive any information which you considered reliable concerning his action in Charleston, West Virginia?

Mr. Scott: I object, your Honor.

The Court: Objection sustained.

Mr. Doyle: Exception.

Q. Have you at any time received any information concerning Scher which you considered reliable information and later turned out to be unreliable, false and perjurious?

Mr. Scott: I object.

The Court: Objection sustained.

Mr. Doyle: Exception."

(Page 29, Record.)

(b) "Q. Mr. Bowes, will you tell us the name of your confidential informer?

Mr. Scott: I object.

The Court: Objection sustained.

Mr. Doyle: May I be heard on that?

The Court: No, sir. I will not hear you. That has been too often decided. I have decided it, as you know, and many other courts have decided that question should not be answered. I shall not re-examine the question. I shall not re-examine the

question. I have examined it again within the last 48 hours.

Mr. Doyle: May I dictate my offer?

The Court: Certainly.

Mr. Doyle: The defendant proposes to show by this line of cross examination that the witness received information which he considered reliable at the former trial by producing two witnesses who testified concerning the movements of the defendant Scher which testimony later developed by an investigation by the Attorney General of the United States to be false, perjurious and unreliable."

(Pages 34 and 35, Record.)

(c) "Q. What was the reason for your going out there in this vicinity?

A. I received reliable information from a confidential informer that a certain 1935 Dodge sedan, license LX-418—

Mr. Doyle: I object to the answer, and ask that it be stricken on the ground it is hearsay, and information obtained or statements made not in the presence of the defendant.

The Court: You may save the point.

Mr. Doyle: Exception."

(Page 28, Record.)

It was the intention of the defendant by this line of questioning to determine the name of the confidential informer upon whose information the Government agents claimed to rely. The defendant had an absolute right to know the name of the confidential informer; first, so that the Court might determine whether or not the officers had reasonable cause to believe this informer, and secondly, so that the defendant might, if possible, impeach the testimony of the Government's witnesses.

One of the facts, upon which the agents based their search of the defendant's premises without a warrant, was that they had been informed that a certain automobile of a

certain license number would transport liquor at a certain time. This information was obtained by the agents from one whom the agents called a "confidential informer," and upon whose information they relied. The court, however, refused to allow the counsel for defendant to cross examine the Government witnesses as to the name of the confidential informer, nor did the court permit counsel for defendant to show by this testimony that the judgment of the Government agent as to whether or not the information received by him was reliable, had been proved faulty at a former trial of this matter.

If the defendant had been permitted to obtain an answer to this question, the testimony, as indicated by the proffer of testimony, would have been that, at the previous trial of this matter, the witness had introduced evidence which he deemed reliable which was later, after investigation by the Attorney General of the United States, proven to be false, perjurious and unreliable.

The evidence would have shown that after a former conviction of this defendant based on this same indictment, an investigation of the charges of the defendant that the testimony which the officers deemed reliable was unreliable, false and perjurious, the Government confessed error in the Court of Appeals, upon which confession of error, the cause was reversed and remanded and the present trial had.

In the case of *U. S. vs. Blich*, 45 Fed. (2nd) 627, the agents had been informed by a reliable person, whom they believed, that the defendant who had previously been convicted of violating liquor ordinances, would transport liquor at a certain place and date. The agents, however, refused to state the name of their informant. The court held that the agents should be required to give the name of the informant. The syllabus of that case reads as follows:

"4. Officers making searches and seizures for transportation of liquor, on public highway, without warrant *must, to establish probable cause, disclose every element making up case.* (The rule reasonably includes the source of their information, so that the court may determine whether, under all the circumstances, a case of probable cause has been established, and perhaps as well to restrict informers to sincerity of purpose.)"

Thus, in the case at bar, the defendant was entitled to know the name of the confidential informer and the source of the information allegedly obtained by the Government agent *so that the court might determine whether a case of probable cause had been established.*

In *Cornelius on "Search and Seizure"* at page 124, par. 41, it is said:

"Information furnished by another that an offense has been committed may or may not constitute probable cause justifying arrest without warrant, the sound rule being that the information relied upon must be such as will justify a reasonably prudent man in believing that the particular person arrested was guilty of felony.

Again we find that general principles aid us but little in determining what constitutes probable cause but an examination of the cases cited in (1) and (2) to note 42 indicates the rule that the information imparted should be by some person who has actually observed such facts as would constitute probable cause to believe the offenses had been committed."

See also *People vs. Miller*, 245 Mich. 115, 222 N. W. 151.

The agents could not have searched the premises and automobile of the defendant without a warrant unless they had probable cause to do so. Under the authorities cited herein probable cause must be based on facts such as would lead a reasonably cautious and prudent man to believe that

tax unpaid liquor was being transported. It is therefore our contention that the defendant was entitled to know the source of the agents' information so that the court might determine whether or not a case of probable cause had been established.

It would be a gross miscarriage of law to place entirely in the hands of the agents the right to adjudicate whether or not they had probable cause to search private dwellings, by giving them the sole right to determine the reliability of their information.

It is a great injustice to permit them to keep concealed the source of their information, so that their testimony can not be refuted. Whether the information was true or false, reliable or unreliable, the citizen whose premises are searched without warrant must submit to and is bound by the opinion of the agents that their information was reliable.

To so hold would be a violation not only of the terms and purposes of the 4th Amendment of the Constitution, but would be contrary to the principles enunciated by our courts throughout the years. It would permit any officer upon any justification that he deemed sufficient to invade the sanctity and privacy of a man's home and to subject those premises to a search without a warrant. This clearly is not and cannot be the law.

Furthermore, under the rules of evidence, a witness should be required to answer such questions as are material to the issue in order to give the defendant an opportunity to impeach the testimony of the witnesses or to investigate the truth thereof. The names of the informant upon whom the agents relied is, certainly, material to the issue of probable cause.

The Court refused to strike from the testimony the statement made by the Government witness that he had received reliable information from the confidential in-

former. (Record, 28.) This information was purely hearsay and was not a statement made in the presence of the defendant. Under these circumstances, the Court, by its ruling, denied to the defendant his constitutional right to face his accusers and to answer the charges allegedly made against him by the so-called reliable informer.

We therefore contend, that since the search without a warrant in the case at bar was based on information obtained from a "confidential informer," that the defendant and the Court were entitled to know the name of that informer and all the circumstances, so that the Court could determine whether or not the information was given by a reliable informant.

We therefore contend, that the court below erred in sustaining the objection to the question as to the name of the confidential informer.

C. MOTION FOR NEW TRIAL.

We submit that the Court of Appeals erred in not reversing and remanding this case for failure of the Trial Court to grant defendant's motion for new trial based on the specifications of error hereinabove disclosed. For the foregoing reasons, it is respectfully submitted that the judgment of the Trial Court and its affirmance of said judgment by the Court of Appeals should be reversed and a new trial be awarded by this Court.

A. L. GREENSPUN,

Attorney for Petitioner.

GERALD A. DOYLE,

Of Counsel.

APPENDIX A.

Opinion of the United States Circuit Court of Appeals.

No. 7773.

UNITED STATES CIRCUIT COURT OF APPEALS
SIXTH CIRCUIT.HYMAN SCHER, alias WILLIAM SCHER,
Appellant,

VS.

THE UNITED STATES OF AMERICA,
*Appellee.*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

Decided February 18, 1938.

Before Moorman and Allen, Circuit Judges, and Nevin,
District Judge.

Per Curiam. The appellant was found guilty under two counts of an indictment charging him with unlawful possession and transportation of distilled spirits, the containers of which did not have revenue stamps affixed thereto. The offenses charged were violations of Section 1152a, Title 26, U. S. C.

Investigators of the Alcohol Tax Unit at Cleveland, Ohio, received confidential information from a source previously proved to be reliable that a load of tax-unpaid distilled spirits in bottles would be taken from a given address in a certain car, the make, model, and license number of

which were given, at about midnight of December 30, 1935. The investigators saw appellant call at the designated address in a car of the specified make, model and license number, at about nine P. M., and leave about ten-thirty, carrying a package and accompanied by three women. The car returned about midnight. It was parked without lights in the driveway at the rear corner of the house for about half an hour. From the opposite side of the street the investigators heard the rear door of the house open, and several times heard the sound of heavy paper being scraped across a hard surface, after which they heard two doors slam. Appellant then drove the car, which appeared to be heavily loaded, to his residence. He drove into the garage, and was in the act of getting out of the car when one of the investigators approached with a flashlight, and asked if the car was hauling bootleg whiskey. Appellant said it was for a party, and in reply to the question as to whether it was tax paid, said that it was "Canadian whiskey," and that it was in the trunk of the car. In the car eighty-eight bottles without tax stamps were found in fourteen packages similar to that which appellant had previously carried from the premises under observation.

Appellant's principal contentions are (1) that the court erred in denying appellant the right to cross-examine as to the identity of the informant, and (2) in overruling appellant's motion to suppress the evidence.

As to the first contention, for reasons of public policy the identity of a confidential informant must be kept secret, and such sources need not be disclosed. *Segurola v. United States*, 16 Fed. (2d) 563 (C. C. A. 1); *Vogel, Extr., v. Gruaz*, 110 U. S. 311; *Shore v. United States*, 49 Fed. (2d) 519 (C. A. D. C.); *McInes v. United States*, 62 Fed. (2d) 180 (C. C. A. 9); *Wilson v. United States*, 65 Fed. (2d) 621 (C. C. A. 3); *Goetz v. United States*, 39 Fed. (2d) 903 (C. C. A. 5).

As to the second contention, appellant moved to suppress evidence obtained as a result of the search, on the ground that the search was without a warrant or without probable cause, and in violation of Section 14, Article 1, of the Constitution of Ohio, and the Fourth and Fifth Amendments to the Constitution of the United States. The District Court overruled this motion, and its action was correct. The garage was not searched. Appellant did not oppose the search of the car. The circumstances presented facts within the personal knowledge of the agents, sufficient to lead a reasonably discreet and prudent man to believe that liquor was illegally possessed in the automobile. There was no unlawful search and seizure. *Husty v. United States*, 282 U. S. 694; *Carroll v. United States*, 267 U. S. 132, 149; *Wisniewsky v. United States*, 47 Fed. (2d) 825 (C. C. A. 6); *Ferracane v. United States*, 47 Fed. (2d) 677 (C. C. A. 7). *United States v. Kind*, 87 Fed. (2d) 315 (C. C. A. 2) is distinguishable upon the facts.

The judgment is affirmed.

Judge Moorman took no part in the decision of this case.

APPENDIX B.

**Order of United States Circuit Court of Appeals
Amending Opinion.**

No. 7773.

**UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT.**

HYMAN SCHER

v.

UNITED STATES OF AMERICA.

Before: Hicks, Allen and Nevin, JJ.

It is ordered, that the opinion in the above case be amended by striking out of the next to last paragraph thereof the following sentence: "Appellant did not oppose the search of the car."

FLORENCE E. ALLEN,
U. S. Circuit Judge.

Filed: April 13, 1938.